

AKIN GUMP STRAUSS HAUER & FELD LLP  
1333 New Hampshire Avenue  
Washington, D.C. 20036  
(202) 872-4000  
Cheryl A. Falvey (CA-2074)  
Thomas P. McLish  
Troy D. Cahill  
*Attorneys for Defendant Wendy's International, Inc.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ADAM JERNOW, on behalf of himself and  
all others similarly situated,

Plaintiffs,

-against -

WENDY'S INTERNATIONAL, INC.,

Defendant.

Case No. 07-Civ-3971 (LTS) (THK)

Hon. Laura Taylor Swain

**NOTICE OF MOTION TO  
DISMISS THE AMENDED  
COMPLAINT**

PLEASE TAKE NOTICE THAT pursuant to Federal Rule of Civil Procedure 12(b)(6) the undersigned hereby moves this Court, before the Honorable Laura Taylor Swain, United States District Judge, in the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York at such time as shall be heard by the Court, for an order dismissing Plaintiff's Amended Complaint. A memorandum of law is being filed contemporaneously in support of this motion to dismiss.

Dated: July 16, 2007  
New York, New York

Respectfully submitted,

By: /s/  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
Cheryl A. Falvey (CA 2074)  
Thomas P. McLish  
Troy D. Cahill  
1333 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 887-4000 (telephone)  
(202) 887-4288 (facsimile)

*Attorneys for Defendant Wendy's International, Inc.*

AKIN GUMP STRAUSS HAUER & FELD LLP  
1333 New Hampshire Avenue  
Washington, D.C. 20036  
(202) 872-4000  
Cheryl A. Falvey (CA-2074)  
Thomas P. McLish  
Troy D. Cahill  
*Attorneys for Defendant Wendy's International, Inc.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ADAM JERNOW, on behalf of himself and  
all others similarly situated,

Plaintiffs,

-against -

WENDY'S INTERNATIONAL, INC.,

Defendant.

Case No. 07-Civ-3971 (LTS) (THK)

Hon. Laura Taylor Swain

**DECLARATION OF THOMAS  
P. McLISH REGARDING  
EXHIBITS TO MOTION TO  
DISMISS**

I, Thomas P. McLish, hereby declare that the following is true and correct and  
based on my personal knowledge:

1. I am an attorney with the law firm of Akin Gump Strauss Hauer & Feld  
LLP, counsel of record for Defendant. I submit this declaration in support of Defendant's  
Motion to Dismiss the Amended Complaint.

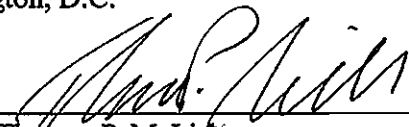
2. Attached hereto as Exhibit A is a true and correct copy of the nutritional  
display poster referenced by and relied upon by the Amended Complaint. The nutritional  
display poster as attached is in reduced format in order to accommodate standard paper

size. The actual size of the poster in store is approximately 30 inches high by 18 inches wide. A copy can be made available to the court upon request.

3. Attached hereto as Exhibit B is a true and correct copy of the Consumer Reports article referenced by and relied upon by the Amended Complaint.

4. Attached hereto as Exhibit C is a true and correct copy of the www.Forbes.com article referenced by and relied upon by the Amended Complaint.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of July 2007, at Washington, D.C.

  
\_\_\_\_\_  
Thomas P. McLish

# It's your choice. Quality made fresh. Exhibit A



## Garden Sensations<sup>2</sup>

### Salads

Flavors/Packets/Entire Salads<sup>2</sup>  
Prepared Fresh Daily

Mandarin Chicken <sup>2</sup> Salad	170	2	0.5	0	60	480	18	3	13	23										
Crispy Noodles	70	2.5	0	0	0	190	10	0	0	1									X	
Roasted Almonds	130	11	1	0	0	70	4	2	1	5								X	X	
Oriental Sesame Dressing	190	11	1.5	0	0	490	21	0	19	1							X			
Caesar Chicken Salad	190	5	2.5	0	70	620	9	4	4	27					X					
Homestyle Garlic Croutons	70	2.5	0	0	0	125	9	0	0	2					X			X		
Caesar Dressing	120	13	2.5	0	20	220	1	0	0	1		X	X				X			
Chicken BLT Salad	340	18	9	0	100	980	17	4	6	35					X					
Homestyle Garlic Croutons	70	2.5	0	0	0	125	9	0	0	2					X				X	
Honey Mustard Dressing	280	26	4	0	25	370	11	0	10	1		X								
Southwest Taco Salad	440	22	12	1	80	1100	32	9	10	30					X					
Reduced Fat Acidified Sour Cream	50	4	2.5	0	10	30	2	0	1	1					X					
Seasoned Tortilla Strips	110	5	1	0	0	160	13	1	0	2					X					
Ancho Chipotle Ranch Dressing	110	10	2	0	15	330	4	0	2	1		X			X					
Additional Salad Dressings																				
Fat Free French	80	0	0	0	0	210	19	0	16	0										
Reduced Fat Creamy Ranch**	100	8	1.5	0	15	450	6	1	3	1		X			X					
Low Fat Honey Mustard**	110	3	0	0	0	340	21	0	16	0		X			X					
Italian Vinaigrette	140	12	2	0	0	400	9	0	8	0										
Creamy Ranch	230	23	4	0	15	450	5	0	3	1		X			X					
Blue Cheese**	260	27	5	0	35	480	3	0	1	2		X			X					
Thousand Island**	260	25	4	0	20	440	8	0	7	1		X			X					

\*\*Trans and Saturated Fat are listed separately.  
Nutrition Facts: 100g

## Side Selections

Homemade Dressings  
Balsamic Vinaigrette

	Calories	Total Fat (g)	Saturated Fat (g)	Trans Fat (g)	Cholesterol (mg)	Sodium (mg)	Total Carb (g)	Fiber (g)	Sugars (g)	Protein (g)	Egg	Fish	Milk	Peanuts	Soy	Tree Nuts	Wheat
Side Salad	35	0	0	0	0	25	8	2	4	1							
Caesar Side Salad	80	4.5	2	0	10	240	6	2	1	6				X			
Mandarin Orange Cup	80	0	0	0	0	15	19	1	17	1							
Low Fat Strawberry Flavored Yogurt	90	1	0.5	0	5	55	16	0	14	4				X			
Granola Topping	110	4.5	0.5	0	0	0	15	1	6	2							
Plain Baked Potato (avg. wgt. 10 oz.)	270	0	0	0	0	25	61	7	3	7							
Sour Cream & Chives Baked Potato	320	4	2.5	0	10	55	63	7	4	9				X			
Buttery Best Spread	50	6	1	0	0	90	0	0	0	0				X		X	
Small Chili	220	6	2.5	0	35	780	23	5	6	17							
Large Chili	330	9	3.5	0.5	55	1170	35	8	9	25							
Hot Chili Seasoning	5	0	0	0	0	270	2	0	1	0							
Saltine Crackers	25	0.5	0	0	0	95	4	0	0	0						X	X
Cheddar Cheese, shredded	70	6	3.5	0	15	110	1	0	0	4				X			
Baked! Lay's®	130	2	0	0	0	200	26	2	2	2						X	
Kids' Meal French Fries	280	12	1.5	0	0	270	37	3	0	3				✓	✓		✓
Small French Fries	440	18	2.5	0.5	0	430	58	5	0	5				✓	✓		✓
Medium French Fries	490	20	3	0.5	0	480	64	6	0	5				✓	✓		✓
Large French Fries	590	24	3.5	0.5	0	570	77	7	0	6				✓	✓		✓

## Beverages and Frosty<sup>™</sup>

Regular amounts for  
Expresso<sup>™</sup> Tiramisu

	Calories	Total Fat (g)	Saturated Fat (g)	Total Carb (g)	Fiber (g)	Cholesterol (mg)	Sodium (mg)	Total Cals (g)	Fiber (g)	Sugars (g)	Protein (g)	Egg	Fish	Milk	Peanuts	Soy	Tree Nuts	Wheat
Milk, 2% Reduced Fat Milk	120	4.5	3	0	20	125	12	0	11	7								
Milk, 1% Low Fat Chocolate	170	2.5	1.5	0	15	200	28	0	26	8				X				
Bleed Coke®, Small Cup	0	0	0	0	0	15	0	0	0	0								
Sprite®, Small Cup	130	0	0	0	0	30	34	0	34	0								
Coca-Cola®, Small Cup	140	0	0	0	0	0	37	0	37	0								
Dasani® Water	0	0	0	0	0	0	0	0	0	0								
Chocolate Frosty Junior	160	4	2.5	0	15	75	28	0	21	4				X				
Chocolate Frosty Small	330	8	5	0	35	150	56	0	42	8				X				
Chocolate Frosty Medium	430	11	7	0	45	200	74	0	55	10				X				
Vanilla Frosty Junior	150	4	2.5	0	20	90	26	0	21	4				X				
Vanilla Frosty Small	310	8	5	0	35	180	52	0	43	8				X				

## Sandwiches

Made when you order it using  
about sandwich's standard  
toppings

	Cal	Tot Fat	Sat Fat	Chol	Total Carb	Fiber	Cholesterol	Sodium	Total Cals	Egg	Fish	Milk	Peanuts	Soy	Tree Nuts	Wheat	
Jr. Hamburger	280	9	3.5	0.5	30	590	34	1	7	15							
Jr. Cheeseburger	320	13	6	0.5	40	810	34	1	7	17							
Jr. Cheeseburger Deluxe	360	16	6	0.5	45	870	37	2	8	18							
Jr. Bacon Cheeseburger	370	17	7	0.5	50	790	34	2	6	19							
Hamburger, Kids' Meal	270	9	3.5	0.5	30	590	33	1	6	15							
Cheeseburger, Kids' Meal	320	13	6	0.5	40	810	34	1	7	17							
Ham & Cheese Sandwich, Kids' Meal	240	6	3	0	30	900	32	1	6	14							
Turkey & Cheese Sandwich, Kids' Meal	250	6	3	0	25	910	34	1	5	14							
Classic Single® w/Everything	420	20	7	1	65	880	37	2	8	25							
Big Bacon Classic®	590	30	12	1.5	90	1510	46	3	11	34							
Ultimate Chicken Grill Sandwich	370	8	1.5	0	60	1070	44	2	10	33							
Spicy Chicken Fillet Sandwich	480	17	3	0	60	1400	53	4	8	29							
Homestyle Chicken Fillet Sandwich	470	16	3	0	45	1210	55	2	8	27							
Crispy Chicken Sandwich	380	14	2.5	0	40	880	44	1	5	19							
Black Forest Ham & Swiss Frescata™	470	19	6	0	60	1480	50	4	8	27							
Roasted Turkey & Swiss Frescata	480	20	6	0	60	1520	52	4	4	25							
Frescata Club	440	17	3.5	0	50	1610	50	4	5	23							
Frescata Italiana	510	24	9	0	90	1530	49	4	6	25							
Roasted Turkey & Basil Pesto Frescata	420	15	3	0	40	1520	50	4	3	21							

## Sandwich Components

Our sandwiches can be made to  
order.

Note: For your custom sandwich order, add or  
subtract the right amount of each of the  
following to the total above.

2 oz.** Hamburger Patty	100	7	3	0.5	30	130	0	0	0	10									
1/4 lb.** Hamburger Patty	210	14	6	1	60	260	0	0	0	19									
Ultimate Chicken Grill Fillet	130	2	0.5	0	60	660	2	0	0	26									
Spicy Chicken Fillet	230	11	1.5	0	55	970	13	2	0	22	X	✓							
Homestyle Chicken Fillet	230	10	1.5	0	40	790	15	0	0	20	X							X	
Crispy Chicken Patty	190	10	1.5	0	40	540	12	0	0	14	X	✓	✓						
Roasted Turkey Breast – 4 slices	80	1.5	0	0	30	810	5	0	0	12									
Black Forest Ham – 4 slices	70	1.5	0.5	0	35	780	1	0	1	14									
Genoa Salami – 3 slices	100	8	3	0	50	380	1	0	1	5									
Sandwich Bun	160	2	0	0	0	290	31	1	5	5									
Kaiser Bun	200	2.5	0	0	0	350	38	2	6	7									
Artisan Bread	250	6	1	0	0	510	43	3	2	7									
American Cheese Jr.	45	3.5	2.5	0	10	220	0	0	0	2					X			X	
American Cheese	70	5	3.5	0	15	320	1	0	0	3					X	X		X	
Swiss Cheese	70	6	3.5	0	20	85	0	0	0	5					X				
Bacon – 1 strip	20	1.5	0.5	0	5	95	0	0	0	1									
Mayonnaise – 1 tsp.	30	3	0.5	0	5	60	1	0	0	0	X								
Basil Pesto Sauce – 2 tsp.	70	8	1.5	0	10	100	1	0	0	1	X				X				
Sundried Tomato Vinaigrette – 1 tbsp.	45	3.5	1	0	0	65	3	0	2	0									
Ketchup – 1 tsp.	5	0	0	0	0	80	2	0	2	0									
Mustard – 1/2 tsp.	5	0	0	0	0	50	0	0	0	0									
Honey Mustard Sauce – 1 tsp.	40	3.5	0	0	5	60	3	0	2	0	X								
Oil Pickles – 4 each	0	0	0	0	0	135	0	0	0	0									
Iceberg Lettuce Leaf	0	0	0	0	0	0	0	0	0	0									
Romaine Lettuce Leaf	0	0	0	0	0	0	0	0	0	0									
Tomato – 1 slice	5	0	0	0	0	0	1	0	1	0									
Onion – 4 rings	5	0	0	0	0	0	1	0	1	0									
Roasted Red Peppers – 2 tbsp.	10	0	0	0	0	100	1	0	1	0									

## Exhibit B

Expert • Independent • Nonprofit

**ConsumerReports.org®****CR tests find trans fats in Wendy's fries**

In August fast-food chain Wendy's announced that it had switched to a healthier, nonhydrogenated cooking oil and had rid its french fries of nearly all trans fats. The change, according to the company, meant that the kid-sized fries and breaded chicken sold at all of Wendy's 6,000 U.S. restaurants had no unhealthy trans fats, while small, medium, and large french fries, once loaded with 5 to 7 grams of trans fats, now had just 0.5 grams.

*Consumer Reports* purchased large servings of fries from three Wendy's restaurants in Westchester County, N.Y., in early September. We sent the fries to an independent lab for fatty-acid analysis. We were surprised to find that the lab tests showed the fries contained significantly more trans fat than the 0.5 grams per serving claimed by Wendy's. To double-check the findings, we purchased fries from the same restaurants at the end of September and sent them to the same lab plus another independent lab for a second set of analyses, which confirmed our initial findings. The average amount of trans fat per serving was 2.5 grams.

When asked about the findings, Wendy's representatives said the company had rigorously tested and analyzed the fat content of its fries working with an independent lab. But our tests, based on the same method that Wendy's told us it used, throw doubt on the company's claims. The good news for Wendy's lovers is that the large fries we tested contained significantly less trans fat than the 7 grams they had before the announced cooking-oil change. And Wendy's large fries contain less than half as much trans fat as large fries from Burger King or McDonald's, which each had about 6 grams of trans fat in our tests. Wendy's fries also had a better overall fat profile, with slightly less saturated fat than Burger King's or McDonald's.

**TRANS-FAT HEALTH RISKS**

Trans fats are the most heart-unfriendly fat of all, studies suggest. While both saturated fat and trans fat can raise levels of "bad" artery-clogging LDL cholesterol, trans fats also lower "good" HDL cholesterol. In addition, recent research found that trans fat may increase several indicators of systemic inflammation in healthy people. Excessive or prolonged inflammation can damage the arteries and other structures and increase the risk of heart disease and other illnesses, including diabetes.

The Institute of Medicine of the National Academies, which advises the government, has recommended that people consume as little trans fat as possible. Other nutrition experts recommend limiting combined intake of trans and saturated fat to no more than 10 percent of your total caloric intake, or about 20 grams on a standard 2,000-calorie diet.

While meat and dairy products naturally contain some trans fat, the majority of trans fat in the American diet comes from partial hydrogenation, a process used to solidify and stabilize margarine and the oil used in many baked and fast-food items.

At press time, New York City and Chicago were weighing measures to cut the use of trans fats in local restaurants.

**CR's take**

Wendy's should make the necessary changes to ensure that its nutrition claims are accurate. *Consumer Reports* will continue to monitor the fast-food industry to make sure that Wendy's, KFC, and others that pledge to remove trans fats from their foods live up to their promises.

## Exhibit C



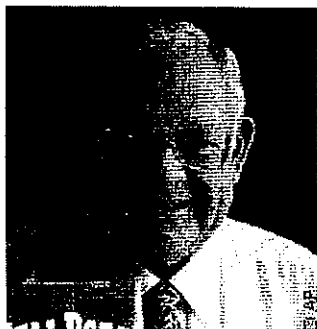
Big Cap Value

## Full Speed Ahead For Wendy's

Tara Murphy, 01.15.02, 8:30 AM ET

The passing of **Wendy's** founder and branding legend **Dave Thomas** last week did little to undercut the Dublin, Ohio-based hamburger chain's market capitalization. Investors drove shares up a dollar on Jan. 8, in a wave of sentimental buying when news of his death broke, and shares have since settled back to \$30, near their all-time high.

Thomas would be happy that investors are looking past cynical projections of the chain's demise in his absence and are instead focusing on the one thing he worked hardest to instill throughout the business: quality.



Cutting costs and chasing market share with lower-quality food was something Thomas would never abide at Wendy's (nyse: WEN - news - people), and that approach has paid off handsomely. Customers are willing to pay more for extra quality in their fast foods, and that has insulated sales during the recent economy downturn. **Tim Hortons**, Wendy's Canadian-based coffee and baked good chain, for instance, saw December same-store sales rise a whopping 13.4% at its Canadian stores. The Canadian operation contributes 30% to pre-tax earnings.

National franchisees will contribute to increase national advertising in 2002 by 30%, which should further boost sales at the No. 3 quick-service burger company. The company bought back 9.7 million shares in the fourth quarter, which could add 5 cents onto fiscal 2002 earnings, according to Salomon Smith Barney. At \$30, the shares are trading at 15 times the

First Call/Thomson Financial estimate of \$1.89 per share.

"By the end of 2002, I would expect Wendy's to be trading at 20 times earnings," says Mark Kalinowski, analyst at Salomon Smith Barney, estimating that Wendy's can earn \$1.92 this year. That's the stock's historical trailing 12-month average. Kalinowski has a "buy" recommendation on the stock and a 12-month price target of \$34. He says the chain's track record is enviable, with positive year-over-year, same-store sales comparisons for the last 12 years. December same-store sales for the Wendy's stores were up 6.3%.

For the third quarter, Wendy's posted third-quarter profits of 44 cents per share, topping the 41 cents reported a year ago, while revenue came in at \$610 million, up 5.6% from last year's \$558 million.

While its competition emphasizes discounts and promotions, Wendy's concentrates on the quality of its core burger and sandwiches products. That quality allows for a 0.7% pricing increase each year, says Alan Hickok, analyst at US Bancorp Piper Jaffrey, who has an "outperform" rating and a \$34 price target on the stock.

According to Salomon Smith Barney research, Wendy's has 13% market share in the quick service hamburger segment, while **McDonald's** (nyse: MCD - news - people) holds down 42% and **Burger King** follows with 19%. "It has brand identity with customers," says Hickok, who says with only 6,000 stores, Wendy's has plenty of room to grow.

"Wendy's is actually less leveraged than its peers, because they run the business more conservatively, and when things get bad, that's the way you want to do things," says

Peter Swan, an analyst at Pacific Growth Equities. Swan has a "buy" rating on the stock and estimates the company will turn in annual earnings per share growth of 10% to 15%.

Anyway you look at it, Wendy's will likely thrive and prosper in the absence of its beloved founder.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Notice of Motion to Dismiss the Amended Complaint to be served this 16th day of July, 2007, by ECF notification to the following persons:

Michael R. Reese  
Kim E. Richman  
Gutride Safier Reese LLP  
230 Park Avenue, Suite 963  
New York, NY 10169

Seth A. Safier  
Gutride Safier Reese LLP  
835 Douglas Street  
San Francisco, CA 94114

Lee A. Weis  
Rebecca Tingey  
Dreier LLP  
499 Park Avenue  
New York, NY 10022

COUNSEL FOR PLAINTIFF

/s/  
\_\_\_\_\_  
Cheryl A. Falvey